CAPITAL CASE – NO DATE OF EXECUTION SET

No. 00-1742

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Abu-Ali Abdur'Rahman,
Petitioner,

v.

Ricky Bell, Warden,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF LAW PROFESSORS LAURENCE H. TRIBE, JAMES S. LIEBMAN, DAVID COLE, PAMELA S. KARLAN, AND HERMAN SCHWARTZ AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Elliot Brown
Counsel of Record
Laura W. Brill
Steve Kang
David C. Codell
Christopher M. Newman
Irell & Manella LLP
1800 Avenue of the Stars
Los Angeles, California 90067
(310) 277-1010
Attorneys for Amici Curiae

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Los Angeles, California 90067
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STATEMENT OF INTEREST OF *AMICI CURIAE*

With the consent of the parties pursuant to Rule 37 of the Rules of this Court,[1] the undersigned law professors submit this brief as amici curiae in support of the petition for writ of certiorari. Amici are teachers and students of constitutional and/or criminal law. They are Laurence H. Tribe, Tyler Professor of Constitutional Law, Harvard Law School; James S. Liebman, Simon H. Rifkind Professor of Law, Columbia Law School; David Cole, Professor of Law, Georgetown University Law Center; Pamela S. Karlan, Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School; and Herman Schwartz, Professor of Law, Washington College of Law, American University.

Amici have an interest in this case because it raises a fundamental issue of fairness regarding the administration of criminal justice and capital punishment in this country. In particular, the Sixth Circuit's decision in this case sends a man to his death without affording him the opportunity to address the factual or legal rationale underlying the court's decision. No system of capital punishment can be counted on to produce fair and reliable outcomes employing such unfair procedures. Only this Court's review can provide a remedy.

SUMMARY OF THE ARGUMENT

This case implicates the fundamental right of a capital habeas petitioner who has been granted relief from a sentence of death by a district court to be apprised of the issues that a court of appeals plans to consider on review of the district court's decision. In the present case, the Sixth Circuit rein-

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[1] A copy of Respondent's written consent is filed herewith. Petitioner's consent has been filed separately with the Clerk of the Court. Pursuant to Rule 37.6, counsel for amici curiae certify that no counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae, or their counsel, has made a monetary contribution to this brief's preparation or submission.

stated Petitioner's death sentence on a ground *abandoned* by the State on appeal and raised *sua sponte* by the Sixth Circuit without according Petitioner notice or an opportunity to be heard on that very issue. Petitioner's right not to be deprived of his life without due process of law and his right to be free from cruel and unusual punishment now hang in the balance.

On petition for writ of habeas corpus, the District Court held an evidentiary hearing to determine whether Petitioner had received at trial the constitutionally mandated minimum level of representation by counsel and, if not, whether Petitioner had been prejudiced by his counsel's ineffectiveness. At the hearing, Petitioner introduced voluminous evidence showing that at sentencing, despite the existence of significant and compelling mitigating evidence, Petitioner's trial counsel inexplicably had presented no mitigating evidence whatsoever. Based on the evidence developed at the evidentiary hearing, the District Court found (1) that Petitioner had received ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and (2) that Petitioner had been prejudiced by his counsel's ineffectiveness because there was a reasonable probability that Petitioner would not have been sentenced to death had his trial counsel introduced the mitigating evidence that existed. The District Court accordingly vacated Petitioner's death sentence.

In the face of the powerful mitigation evidence introduced at the evidentiary hearing, the State on appeal in the Sixth Circuit did not even attempt to challenge the District Court's ruling that Petitioner's trial counsel had been ineffective. Nor did the State attempt to question the District Court's ruling that the evidence introduced at the evidentiary hearing demonstrated prejudice. Instead, the State chose simply to challenge the procedural legitimacy of the evidentiary hearing and to argue that, *absent the evidence developed at the evidentiary hearing*, Petitioner could not demonstrate prejudice from his trial counsel's ineffectiveness. Accordingly, the sole issues raised by the State's appeal were (1) whether the District

Court had authority to conduct the evidentiary hearing in the first place, and (2) whether, without the evidence adduced at the evidentiary hearing, Petitioner could demonstrate prejudice from his counsel's ineffectiveness.

Under Sixth Circuit precedent, issues not raised on appeal are deemed abandoned, and the Sixth Circuit has a well-established practice of not considering such abandoned issues other than in "exceptional" cases where it "would constitute a miscarriage of justice" not to address those issues—a circumstance not present where, as here, the State itself makes a tactical choice not to pursue a ground for appeal on habeas. In reasonable reliance on such Sixth Circuit precedent, Petitioner confined his arguments in opposition to the State's appeal in the Sixth Circuit to the two issues raised by the State. Petitioner did not address in his brief issues that had not been raised and which therefore, as a matter of Sixth Circuit precedent, were to be deemed abandoned. Petitioner accordingly defended the propriety of the evidentiary hearing and argued alternatively that even without the evidence adduced at the federal hearing Petitioner was clearly prejudiced by his counsel's ineffective assistance. Petitioner did not address the District Court's findings regarding the evidence introduced at the evidentiary hearing, nor the District Court's ruling that the evidence adduced at the federal evidentiary hearing demonstrated that there had been ineffective assistance of counsel resulting in prejudice.

At oral argument before the Sixth Circuit, Petitioner's counsel stated that it was undisputed that the evidence introduced at the federal evidentiary hearing demonstrated ineffective assistance of counsel and resulting prejudice. Neither the Sixth Circuit nor the State's counsel challenged this contention. Indeed, consistent with the rule that issues not raised on appeal are deemed abandoned, the Sixth Circuit circumscribed oral argument on the State's appeal to the two issues the State had presented. After the oral argument, the Sixth Circuit did not request supplemental briefing or argument. In

particular it sought no briefing or argument regarding whether, if the District Court's evidentiary hearing were proper, the evidence introduced at the evidentiary hearing demonstrated that Petitioner had been prejudiced by his counsel's ineffective assistance.

The Sixth Circuit affirmed the District Court's authority to conduct the evidentiary hearing. Astonishingly, however, the Sixth Circuit *sua sponte*—without notice to any of the parties and without the benefit of any argument by counsel on the issue—reversed the District Court's ruling that had vacated Petitioner's death sentence, on a ground entirely different from any raised by the State in its appeal. The Sixth Circuit determined that the evidence presented at the federal habeas hearing failed to support a finding of prejudice—notwithstanding that the State had not even bothered to make an argument in support of such a ruling. The Sixth Circuit identified no exceptional circumstances or miscarriage of justice that required it to address the issue that the State had abandoned on appeal, and nothing short of clairvoyance would have enabled Petitioner to anticipate that the Sixth Circuit's ruling might be based on an issue that had been neither briefed nor addressed in oral argument by the parties or the Court.

The essence of the due process guarantee is that a person may not be deprived of life, liberty, or property without notice and an opportunity to present arguments on the issues to be decided. Notice must include not only information that a hearing is about to occur, but information as to what the hearing will entail and what issues may be adjudicated. A meaningful opportunity to be heard in the habeas context must provide the petitioner some reasonable opportunity to present the reviewing court with not only the facts relevant to his petition, but also the legal argument and authorities on which the petition may be decided. A habeas petitioner's right to an opportunity to be heard by the reviewing court cannot be satisfied simply because that court has before it all

of the evidence in the record—particularly where the petitioner is opposing a state's efforts to have a death sentence reinstated. Rather, fairness demands that the petitioner have an opportunity to present argument and authority that would guide the Court through the record and any legal issues that may be dispositive of the petition.

The importance of meaningful notice and opportunity to present arguments is particularly strong where the petitioner's life hangs in the balance, especially where, as here, a district court has determined that the petitioner's death sentence was unconstitutionally imposed. This Court has consistently held that decisions concerning imposition of the death penalty must afford the defendant notice of the crucial issues under consideration and an opportunity to rebut the arguments arrayed against him. Thus, where a habeas court determines the validity of a capital sentence—and particularly where, as here, an appellate court reinstates a capital sentence that had been vacated below—fundamental fairness demands that the petitioner have meaningful notice and the opportunity to oppose the arguments against him.

Petitioner has demonstrated the existence of conflicts among the circuits regarding the important issues in this case. Even were this Court to conclude that there is no circuit conflict that might independently warrant certiorari review, however, the egregious failure of the Sixth Circuit to provide Petitioner fair notice and an opportunity to be heard on the issue that proved decisive of his efforts to obtain federal relief from an unconstitutionally imposed sentence of death "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. Rule 10(a).

Accordingly, the petition for writ of certiorari should be granted.

ARGUMENT

Certiorari Should Be Granted To Review The Sixth Circuit's Decision, Which Reinstated Petitioner's Death Sentence Without Offering Petitioner Notice And An Opportunity To Be Heard On The Very Issue On Which The Sixth Circuit Based Its Ruling.

An essential element of the due process guarantee of the United States Constitution is that a person may not be deprived of life, liberty, or property without notice and an opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). "The validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring). A goal of such constitutionally guaranteed procedural fairness is to "prevent unfair and mistaken deprivations" of entitlements conferred by law. *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972); *see also Mathews v. Eldridge,* 424 U.S. 319, 335, 343 (1976) (factors in due process analysis include risk of erroneous deprivation and reliability of existing procedures). Notice must include not only information that a hearing is about to occur, but information as to what the hearing will entail. *See, e.g., Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264-65 (1987) (Marshall, J., announcing judgment, joined by Blackmun, Powell, and O'Connor, JJ.); *accord, id.* at 269 (Brennan, J., concurring in part and dissenting in part); *id.* at 273-74 (Stevens, J., dissenting in part). Notice must be of a type "reasonably calculated to apprise" an interested party of the issue to be adjudicated. *See, e.g., Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983) .

Even when only liberty and not life is at stake, a court may not make crucial decisions in a black box without input from the affected party. "The opportunity to present reasons, either

in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Loudermill*, 470 U.S. at 546; *see also Burns v. United States*, 501 U.S. 129, 138 (1991) (sentencing court may not depart upward from guidelines without first notifying parties that it intends to depart). The opportunity for counsel to present legal and factual arguments to a court is critical to the reliability of judicial decision making. Where "only [a] barren record speaks for the indigent . . . he is forced to go without a champion on appeal," and "[a]ny real chance he may have of showing that his appeal has hidden merit is deprived him." *Douglas v. California*, 372 U.S. 353, 356 (1963) (recognizing right to counsel for indigent defendants in direct appeal of criminal convictions).

In capital cases, the need for procedural protections for indigent defendants is even stronger than it is in non-capital cases. This Court has consistently held that decisions concerning imposition of the death penalty must afford the defendant notice of the crucial issues under consideration and an opportunity to rebut the facts and arguments arrayed against him. *See Simmons v. South Carolina*, 512 U.S. 154, 169 (1994) (defendant's due process right to be heard requires that he be afforded an opportunity to rebut the argument justifying a death sentence); *Lankford v. Idaho*, 500 U.S. 110, 127 (1991) (imposition of death sentence without notice to defendant that death penalty was under consideration at sentencing hearing violated due process); *Skipper v. South Carolina*, 476 U.S. 1, 9 (1986) (three justices concurred in vacation of death sentence because petitioner "was not allowed to rebut evidence and argument used against him"); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (imposition of death sentence violated due process when imposed in part on basis of confidential information that defendant had no chance to rebut).

By statute, capital defendants have a right to counsel on appeal in federal habeas corpus proceedings. *See* 21 U.S.C. § 848(q)(4)-(9). That right would be rendered meaningless if

appellate courts were free to reverse district courts' grants of habeas relief without giving counsel for habeas petitioners notice of the grounds on which such reversal were possible and an opportunity to be heard on such possible grounds. Even where the federal Constitution provides no right of access to appellate review, any appellate review provided by the government must be administered with fair, nondiscriminatory procedures. *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956). The Sixth Circuit's action in this case does not satisfy that minimal constitutional requirement.

Courts other than the Sixth Circuit have held in habeas proceedings—even non-capital ones—that in the context of a court's *sua sponte* consideration of an issue not raised by the parties, fairness requires notice to and an opportunity to be heard by the party to be affected. *See Magouirk v. Phillips*, 144 F.3d 348, 359 (CA5 1998) (when a federal district court raises procedural default *sua sponte*, failure to provide the habeas petitioner with notice and a reasonable opportunity to present argument against dismissal may constitute an abuse of discretion); *Esslinger v. Davis*, 44 F.3d 1515, 1528 (CA11 1995) ("[W]e think it fundamentally unfair for a court *sua sponte* to invoke a procedural default without giving the petitioner an opportunity to show cause for the default."); *id.* at 1528 n. 45 ("If the petitioner is to be afforded due process, he must receive notice of the court's inclination to interpose the default, an opportunity to demonstrate 'cause' for the default and 'prejudice,' and, if material issues of fact are present, an opportunity to present his evidence."); *Williams v. Whitley*, 994 F.2d 226, 232 (CA5 1993) (a district court may raise *sua sponte* abuse of the habeas writ provided that the petitioner is afforded an adequate opportunity to explain why his petition should not be barred as successive or abusive); *United States v. Fallon*, 992 F.2d 212, 213 (CA8 1993) (district court may raise abuse of writ *sua sponte* as long as the petitioner is given adequate opportunity to respond); *Hardiman v. Reynolds*, 971 F.2d 500, 505 (CA10 1992) ("Prior to dismissing

an action sua sponte, a court must give the complainant an opportunity to respond to the argument for dismissal."); *see also Washington v. James*, 996 F.2d 1442, 1444 (CA2 1993) (requiring additional briefing when procedural default raised *sua sponte* on appeal).

This Court has also expressed concern, in the context of habeas corpus proceedings, regarding the unfairness that can result when an appellate court raises an issue *sua sponte* and decides a case on that basis without offering the parties notice or an opportunity to be heard on that issue. *See Trest v. Cain*, 522 U.S. 87, 92 (1997) (vacating ruling of court of appeals, which had determined, *sua sponte*, and without providing the parties the opportunity for further briefing, that a procedural default barred petitioner's federal habeas claim). As this Court stated in *Trest* with reference to the benefits of offering the parties an opportunity to provide briefing on questions that a court raises *sua sponte*, "often, as here, that somewhat longer (and often fairer) way 'round is the shortest way home." *Id.; cf. Granberry v. Greer*, 481 U.S. 129, 132 & n. 6 (1987) (recognizing need for procedural fairness in habeas context where state raises argument of non-exhaustion of state court remedies for the first time on appeal).

Here, the Sixth Circuit afforded Petitioner no opportunity to guide the panel through the District Court record in order to avoid a mistaken re-imposition of a sentence of death. In Petitioner's brief before the Sixth Circuit, Petitioner's counsel reasonably chose not to offer argument or authority to demonstrate that the District Court had correctly concluded that the evidence before it established that Petitioner was prejudiced by his counsel's ineffectiveness because there was no reason for Petitioner to offer such argument. The State's attorney had made a conscious decision to abandon a principal argument below (that the federal court evidentiary record did not establish prejudice). Instead, the State had framed the issue on appeal to be whether "*[w]ithout the evidence at the federal evidentiary hearing*, . . . the petitioner demonstrate[d]

prejudice from trial counsel's deficient performance." Br. of Respondent-Appellant 3 (CA6, Nos. 98-6568, 98-6569) (emphasis added). A premise of our adversarial system is that when an appellant abandons an issue on appeal, the appellee accepts the concession and does not burden the appeals court with superfluous argument on points not raised.

At oral argument, Petitioner's counsel expressly relied on the State's narrow framing of its appeal and chose not to address the question whether the District Court's finding of prejudice based on the evidence at the federal habeas hearing was correct. Petitioner's counsel prefaced his argument by stating his understanding that "it is not in dispute, not disputed by the state that the merits of the district court decision concerning whether the petitioner was prejudiced by ineffective assistance of counsel was correct." Trans. of Oral Arg. 14-15. Neither the State's counsel nor the Sixth Circuit so much as suggested at any time during oral argument that Petitioner's understanding of the State's appeal was incorrect. Petitioner's counsel proceeded to devote his oral argument to the question whether the District Court had authority to expand the factual record by conducting an evidentiary hearing.

Petitioner's decision not to present to the Sixth Circuit either argument or authority regarding the evidence adduced at the federal hearing was sound given Sixth Circuit precedent establishing that arguments not expressly raised on appeal in habeas cases are deemed abandoned. Sixth Circuit precedent clearly embraced the practice of not considering any such abandoned arguments. *See, e.g., McMurphy v. City of Flushing*, 802 F.2d 191, 198-99 (CA6 1986); *Mitchell* v. *Myers*, No. 96-6214, 1998 U.S. App. LEXIS 17897, at *2-*3 (CA6 July 31, 1998); *Mathis* v. *Dutton*, No. 94-5511, 1995 U.S. App. LEXIS 2922, at *2 (CA6 Feb. 10, 1995); *Gray* v. *Tennessee*, No. 94-5346, 1994 U.S. App. LEXIS 30156, at *3 (CA6 Oct. 18, 1994); *Hunt* v. *Mills*, No. 92-5695, 1993 U.S. App. LEXIS 6913, at *2 (CA6 Mar. 24, 1993). Sixth Circuit precedent established that only in "exceptional" cases where it

"would constitute a miscarriage of justice" not to consider an abandoned argument would that court give consideration to such an argument. *See Dorris v. Absher,* 179 F.3d 420, 425-26 (CA6 1999) (deciding issue not raised below where district court's ruling was based on an erroneous interpretation of statute and disproportionate damages had been awarded against defendant). There is no reason why Petitioner or his counsel should have suspected that it would constitute a miscarriage of justice for the Sixth Circuit to accede to the State's conscious decision not to challenge the District Court's ruling that the evidence introduced at the federal hearing established that Petitioner was prejudiced by his counsel's ineffectiveness. Indeed, the Sixth Circuit's opinion offers no justification for deciding the issue that had not been addressed by the parties, and there is no legal presumption applicable here that might suggest that the State should not have been deemed to have waived the argument that Petitioner had not demonstrated prejudice in the District Court proceeding. Moreover, the question that proved to be dispositive to the Sixth Circuit in this case—whether Petitioner suffered prejudice from his counsel's ineffectiveness—raises none of the comity or federalism concerns that have led some courts in the habeas context to raise questions *sua sponte*. *Cf. Granberry*, 481 U.S. at 133-34 (addressing issue of exhaustion of state court remedies).

The choice by Petitioner's counsel to focus on the issues that the State had raised in its appeal was not only wise based on Sixth Circuit precedent, but also consistent with fundamental principles of appellate advocacy endorsed by this Court. Justice Jackson famously observed that "[o]ne of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally," for "[l]egal contentions, like the currency, depreciate through over-use." *Jones v. Barnes*, 463 U.S. 745, 752 (1983) (quoting Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 25 Temple L.Q. 115, 119 (1951)). As this Court explained in

Jones with respect to appellate argument, "[e]xperienced advocates since time beyond memory have emphasized the importance of . . . focusing on one central issue if possible, or at most on a few key issues." 463 U.S. at 751-52. The Court in *Jones* noted the importance of economy of argument notwithstanding its recognition that points not argued by a criminal defendant on appeal could be forfeited. The same rules should presumably apply to the State, and it would be perverse to penalize *Petitioner* here for limiting his arguments in opposition to the State's appeal to those issues to which the State had, for tactical reasons, restricted its appeal.

Furthermore, although, as noted by the Petitioner, the Circuit Courts of Appeals have not uniformly applied waiver principles in habeas corpus cases, Pet. 9, the Petitioner in the present case had no reason to anticipate that the Sixth Circuit would excuse the State's failure to raise a potentially dispositive issue without giving the Petitioner any opportunity to address that substantive issue or the antecedent question whether any abandonment by the State of that substantive issue should be overlooked.[2] This Court has made clear that the due process requirement includes the notion that courts should not change their own rules in the middle of the game where the effect would be to deny a litigant an opportunity to be heard. *Cf. Bouie v. City of Columbia*, 378 U.S. 347 (1964) ("When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due pro-

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[2] The Respondent's decision not even to attempt to appeal the ruling that Petitioner was prejudiced in light of the evidence adduced in the federal habeas hearing speaks volumes about the strength of Petitioner's ineffective assistance claim on the merits, the correctness of the District Court's decision, and the gravity of the Sixth Circuit's disposition of the issue without giving Petitioner notice and an opportunity to be heard.

cess of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.'") (citation omitted).

The importance of legal argument from the parties could not be clearer than in the Sixth Circuit's opinion in this case, for that opinion in no way suggests any awareness by the panel of the issues implicated by its *sua sponte* consideration of the question whether the *Strickland* prejudice prong was satisfied in light of the evidence introduced in the federal District Court. Petitioner could not have anticipated the Sixth Circuit's reasoning on this issue, as the panel did not so much as hint during oral argument that it was considering an issue not raised by the State on appeal.[3]

The opportunity to be heard that is central to the federal due process guarantee includes the opportunity not only to present facts, but to present legal argument and to point the decision maker to relevant legal authority. This Court has repeatedly recognized that, both for courts and litigants, the presentation of legal argument is essential for reliable adjudication. *Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 121 S. Ct. 1043, 1051 (2001) (explaining that "proper exercise of the judicial power" depends upon "the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case"). For

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[3] Furthermore, although Petitioner sought rehearing on the ground that it was improper for the Sixth Circuit to reach the issue *sua sponte* without any argument by the parties, the Sixth Circuit denied rehearing, and Petitioner never obtained an audience before that court on the merits of the District Court's decision that the evidence adduced at the federal evidentiary hearing showed that Petitioner was prejudiced by his counsel's ineffectiveness. In any event, rehearing is an extraordinary remedy—rarely granted and requiring a court to reconsider a ruling already issued—that cannot suffice to provide what is recognized as the most ordinary, and fundamental, demand of due process—namely, an opportunity to precede deliberation with argument.

example, in explaining the scope of exhaustion requirements in the federal habeas context, this Court has emphasized and relied upon the central importance that presentation of legal argument in addition to presentation of legal facts enjoys. In holding in *Picard v. Connor*, 404 U.S. 270 (1971), that the substance of a federal habeas corpus claim must be fairly presented in the first instance to the state courts, the Court observed that although "[t]o be sure, respondent presented all the facts" to the state court, the respondent, by failing to present argument in state court regarding a constitutional claim, had failed to give the state court "'an opportunity to apply controlling legal principles to the facts bearing upon'" that claim. *Id.* at 277 (citation omitted); *cf. Quong Wing v. Kirkendall*, 223 U.S. 59, 63-64 (1912) (Holmes, J.) ("[E]ven if, when called to our attention, the facts should be taken notice of judicially . . . still there are many things that courts would notice if brought before them that beforehand they do not know. It rests with counsel to take the proper steps . . . .") (citations omitted).

Similarly, a habeas petitioner has not been afforded an opportunity to be heard by a reviewing court simply because the reviewing court states that it has considered all the evidence in the record—particularly where the reviewing court is not affirming the decision below, whether on the same or new grounds, but is instead reversing a district court's ruling in favor of a petitioner. Rather, fair play requires that the petitioner be given an opportunity to present argument and controlling legal authority on any issues that might be dispositive of his petition, especially where the appellate court is considering whether to reverse a district court's decision to vacate a death sentence. Were it otherwise, given the *de novo* review that *Strickland* requires an appellate court to exercise, *see* 466 U.S. at 698, an appellate court would never be required to entertain written or oral argument on a *Strickland* claim on habeas provided that it reviewed all of the evidence in the record. In any event, bad as it would be for appellate courts to

dispense with briefing and oral argument in such situations, it is even worse for an appellate court to entertain briefing and argument and then go off on its own as the Sixth Circuit did here. The Sixth Circuit's approach makes the expectations reasonably generated by the practices of briefing and argument merely "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California,* 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

Had the Sixth Circuit provided some notice to Petitioner that it would consider the issue whether the District Court's finding of prejudice should be sustained based on all the evidence considered by the District Court and had the Sixth Circuit afforded Petitioner an opportunity to argue that issue—even if only at oral argument—Petitioner's arguments on appeal would obviously have been significantly different. Rather than devoting his argument in opposition to the State's appeal to a refutation of the State's contention that the District Court lacked authority to conduct the federal habeas hearing, Petitioner could have focused on the differences between the evidence presented to the District Court and the record before the state post-conviction courts and could have explained why the District Court's finding of prejudice was proper in light of the evidence before it. Moreover, Petitioner could have presented any or all of the arguments that he now raises in Part II of his petition for certiorari. Thus, Petitioner could have presented argument on the following issues in connection with the evidence before the federal habeas court: (i) the proper test for finding prejudice from counsel's failure to introduce mitigation evidence as set forth in cases decided by the Fifth, Seventh, Eighth, and Eleventh Circuits; (ii) the effect of mitigation evidence on the jurors' sense of Petitioner's "moral culpability" in light of *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000); (iii) the requirement that the reviewing court consider the "totality" of the mitigation evidence and not merely discrete "aspects" of that evidence in

analyzing the prejudice issue; (iv) whether and how the Sixth Circuit's analysis of prejudice should have been affected by the existence of aggravating circumstances; (v) whether evidence of Petitioner's past violent behavior was harmful to Petitioner despite this Court's observation in *Williams*, 529 U.S. at 398, that such evidence can be mitigating by showing that a defendant's violent acts may be compulsive rather than premeditated; (vi) whether the District Court properly found prejudice based on its conclusion that a single juror might have been swayed against the death penalty; and (vii) the case law finding prejudice where a defendant's counsel failed to present *any* mitigation evidence to the jury—a fact on which the District Court placed considerable importance and which the Sixth Circuit elided in its opinion. Furthermore, as noted earlier, Petitioner could have pointed out to the Sixth Circuit that the State had abandoned the prejudice issue by not raising it in its appeal and that there were no exceptional circumstances that would justify overlooking that abandonment.

Petitioner did not raise any of these arguments in his brief or at oral argument because there was no reason for him to do so in light of the State's failure to raise in his briefs or at oral argument the issue whether the District Court's finding of prejudice could be sustained based on the evidence considered by the District Court. The fact that Petitioner in the present case included in his appellate brief's statement of facts some evidence that he had introduced in the District Court does not diminish his claim that he was not on notice of any need to argue the legal significance of those facts given the limited manner in which the State had framed the issue on appeal.

The Sixth Circuit's failure to consider argument from the parties' counsel on questions that turned out to be dispositive of whether Petitioner should die at the hands of the State led it to disregard crucial issues on which the parties justly believed they had no need to focus—including an issue of such national importance that this Court granted certiorari on the

question just two years ago in order to resolve a conflict among the circuits on the issue. In *Williams,* this Court granted review of (but ultimately did not address) the question whether, in a state in which a single juror can prevent the imposition of the death penalty at sentencing, the *Strickland* prejudice inquiry should properly focus on whether there exists a reasonable probability that *even a single juror* would have concluded that the death penalty was appropriate. Although Tennessee is such a state, the Sixth Circuit in the present case, unlike the District Court, utterly failed to consider the implications of Tennessee sentencing law for the *Strickland* inquiry and instead erroneously framed the *Strickland* prejudice inquiry in terms of the probability that the "sentencing jury" as a whole would have concluded in light of mitigating and aggravating circumstances that petitioner should be sentenced to death. The Sixth Circuit's complete disregard of such a crucial issue—an issue which had recently commanded this Court's focus—was undoubtedly the result of the Sixth Circuit's failure to afford counsel for Petitioner and the State an opportunity to address the issue by presenting relevant authority, as well as argument based on the facts adduced in the federal habeas hearing.

In undertaking, on its own initiative, to revisit and reverse the District Court's determination that the record developed in the federal evidentiary hearing supported Petitioner's claim of prejudice, the Court of Appeals, in two respects, reached a decision much weightier even than the one usually made by the District Court in the first instance: First, unlike a decision by a district court, a court of appeals' first-hand interpretation of the record is unreviewable save by a writ of certiorari. Second, the status quo at the time the Court of Appeals undertook its review was that Petitioner was *not* facing imminent execution at the hands of the State, making the court's review of the record the practical equivalent of a decision whether to reimpose the death penalty. The Court of Appeals chose to make this life-or-death determination without alert-

ing the parties as to the manner in which it intended to do so, and without giving Petitioner a chance to be heard on the issue that proved to be decisive before the Sixth Circuit. The Sixth Circuit thereby provided Petitioner with no reasonable notice and opportunity to present argument on the issue that ultimately led that court to reinstate his death sentence.

It is putting it mildly to describe as ill-advised the Sixth Circuit's decision to dispense with argument by counsel on the issue that proved, in the Sixth Circuit's own estimation, to be decisive of whether Petitioner should live or die at the hands of the State. The District Court record was voluminous, and the evidence that needed to be considered extensive. The record included transcripts of a District Court evidentiary hearing that spanned six full days of live testimony and that involved over twenty witnesses and more than one hundred fifty exhibits. The notion that the Sixth Circuit could adequately review such evidence *without the benefit of argument from counsel* as to how that evidence showed that Petitioner was prejudiced by his counsel's ineffectiveness defies credulity and runs counter to this Court's recognition of the important role played by counsel in highlighting the significance of particular evidentiary facts. *Cf. Simmons*, 512 U.S. at 174 (Ginsburg, J., concurring) ("[T]he defendant's right to be heard means that he must be afforded an opportunity to rebut the argument [against him].") The Sixth Circuit's disregard of the importance of such argument borders on brazenness in the capital sentencing context: "Because sentences of death are 'qualitatively different' from prison sentences, this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) (citation omitted).

Under these circumstances, even if the Sixth Circuit's decision in this case raised no conflict of law among the circuit

courts—although such conflicts are apparent in this case—review on certiorari would still be appropriate because the Sixth Circuit's decision in this case "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. Rule 10(a). Cases such as this one involving "serious questions in the administration of federal criminal justice," are appropriate for this Court's review, even where no circuit split is identified. *McNabb v. United States*, 318 U.S. 332, 333 (1943) (granting certiorari to consider question of admissibility of evidence in criminal proceeding). *See also Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting) ("As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation."). This Court has also recognized the appropriateness of review in capital cases raising important questions of criminal procedure. *See Mallory v. United States*, 354 U.S. 449, 450 (1957). Here, it is only review by this Court that will give Petitioner the right—*in any tribunal*—to defend the District Court's ruling that the evidence adduced at the federal evidentiary hearing demonstrated that he was prejudiced by his counsel's ineffective assistance at sentencing and that his death sentence was unconstitutionally imposed. This Court accordingly should grant Petitioner's request for review so that he may be heard, as fundamental fairness in the administration of justice requires, on the issues that will determine whether he lives or dies.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

Elliot Brown
(Counsel of Record)
Laura W. Brill
Steve Kang
David C. Codell
Christopher M. Newman
Irell & Manella LLP
1800 Ave. of the Stars
Suite 900
Los Angeles, CA 90067
(310) 277-1010

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